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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DEBRO ONN SAAD, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent.	B231890 (Los Angeles County Super. Ct. No. NC054688)

APPEAL from a judgment (order) of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Affirmed.

Leo Branton, Jr., for Plaintiff and Appellant.

Robert E. Shannon, City Attorney, and Barry M. Meyers, Senior Deputy City Attorney, for Defendant and Respondent.

Plaintiff Debro Onn Saad appeals from the judgment entered following the sustaining of a demurrer to her first amended complaint without leave to amend. Finding no error or abuse of discretion, we affirm.

BACKGROUND

On June 11, 2010, Saad filed a complaint against defendant "Long Beach Police Department/Municipalities." The complaint, which was prepared without the assistance of counsel, stated in relevant part that in October 2008, the Long Beach Police Department (LBPD) had engaged in "'police misconduct, excessive force, assault/battery, defamation of character, humiliation, tazing, and dragging the body of the plaintiff through the entire length of the convention center.'"

The City of Long Beach (City) demurred on the grounds that the complaint was uncertain, did not allege compliance with the government claims statute (Gov. Code, § 905 et seq. [claims statute]), and did not allege facts sufficient to state a cause of action.[1]

In sustaining the demurrer with leave to amend, the trial court stated that "the complaint lacks articulated legal theories" and "there is no allegation of compliance with the Tort Claims Act. Plaintiff needs to show that she did in fact file a claim with the City prior to instituting litigation."[2]

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[1] According to the demurrer, LBPD is a department within the City.

[2] "Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity. (Gov. Code, § 911.2; *State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1239 (*Bodde*); but see Gov. Code, § 905 [itemized exceptions not relevant here].) In 1979 and 1980, a claim relating to a cause of action for 'injury to person' had to be presented to a government entity 'not later than the 100th day after the accrual of the cause of action.' (Gov. Code, § 911.2, added by Stats. 1963, ch. 1715, § 1, p. 3376.) Since 1988, such claims must be presented to the government entity no later than six months after the cause of action accrues. (Gov. Code, former

On December 10, 2010, Saad filed an amended complaint that stated in relevant part that Saad was subjected to "Police Misconduct[,] excessive force[,] Defamation of character, Ass[au]lt/Battery" at the "Maria Shriver Women's Conference 2008." The amended complaint did not allege that Saad had filed a claim with the City in compliance with the claims statute.

The City demurred on the grounds that the amended complaint was "patently unintelligible," did not allege compliance with the claims statute, and did not "allege a legally-cognizable cause of action."

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§ 911.2, as amended by Stats. 1987, ch. 1208, § 3, p. 4306.) Accrual of the cause of action for purposes of the government claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants. (Gov. Code, § 901; *Whitfield v. Roth* (1974) 10 Cal.3d 874, 884-885; *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 615; *Dujardin v. Ventura County Gen. Hosp.* (1977) 69 Cal.App.3d 350, 355.)

"Timely claim presentation is not merely a procedural requirement, but is, as this court long ago concluded, '"'a condition precedent to plaintiff's maintaining an action against defendant'"' (*Bodde*, *supra*, 32 Cal.4th at p. 1240, quoting *Williams v. Horvath* (1976) 16 Cal.3d 834, 842), and thus an element of the plaintiff's cause of action. (*Bodde*, *supra*, at p. 1240.) Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to a general demurrer for not stating facts sufficient to constitute a cause of action. (*Bodde*, *supra*, at p. 1245.)

"Only after the public entity's board has acted upon or is deemed to have rejected the claim may the injured person bring a lawsuit alleging a cause of action in tort against the public entity. (Gov. Code, §§ 912.4, 945.4; *Williams v. Horvath*, *supra*, 16 Cal.3d at p. 838.) The deadline for filing a lawsuit against a public entity, as set out in the government claims statute, is a true statute of limitations defining the time in which, after a claim presented to the government has been rejected or deemed rejected, the plaintiff must file a complaint alleging a cause of action based on the facts set out in the denied claim. (Code Civ. Proc., § 342; Gov. Code, § 945.6; *Addison v. State of California* (1978) 21 Cal.3d 313, 316; *Tubbs v. Southern Cal. Rapid Transit Dist.* (1967) 67 Cal.2d 671, 675; *County of Los Angeles* [*v. Superior Court* (2005)] 127 Cal.App.4th 1263, 1271; *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 981-982; see Cal. Law Revision Com. com., reprinted at 32A pt. 1 West's Ann. Gov. Code (1995 ed.) foll. § 945.6, p. 33.)" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208-209.)

The trial court sustained the demurrer to the first amended complaint without leave to amend.[3] On January 21, 2011, the court entered judgment for the City. Saad, who is now represented by counsel, timely appealed from the judgment.

DISCUSSION[4]

I. Standard of Review

"'A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]' (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, the standard of review on appeal is de novo. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152.) 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 . . . .) Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by

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[3] The record does not include a reporter's transcript and the minute order does not explain the trial court's reasons for sustaining the demurrer without leave to amend.

[4] We requested supplemental briefing regarding the sufficiency of the operative pleading. In her letter brief, Saad claimed she could amend to allege additional facts. We readily accept Saad's counsel's concession that the complaint is hopelessly confusing. After receiving the supplemental briefing, we examined and deciphered the operative pleading.

making ‘“‘contradictory averments, in a superseding, amended pleading.’”’ (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 957.)

“‘It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s conduct. A demurrer tests only the legal sufficiency of the pleading.’ (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) Thus, as noted, in considering the merits of a demurrer, ‘the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]’ (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 . . . .)

“On appeal, we will affirm a ‘trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]’ (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Accordingly, ‘we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]’ (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.)

II. Because Saad Was Granted Leave to Amend Specifically to Allege Her Compliance with the Claims Statute, Her Failure to Do So Precludes Her From Seeking Leave to Amend for the Same Purpose on Appeal

When the demurrer to Saab’s original complaint was sustained, she was granted leave to amend in order to show that a timely claim was filed with the City in compliance with the claims statute. When Saab’s amended complaint failed to correct this defect, the trial court sustained the demurrer without leave to amend.

On appeal, Saab contends that because she can allege that a timely claim was filed with the City, she should be granted leave to amend. We disagree.

Under Code of Civil Procedure section 472c, subdivision (a) the general rule is that, “When any court makes an order sustaining a demurrer without leave to amend the

question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made."[5]

However, there are exceptions to the general rule. In *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837 (*Las Lomas*), for example, the trial court sustained a demurrer to the plaintiff's petition and complaint and inquired whether the plaintiff wished to amend in order to allege a claim for misrepresentation. The plaintiff's counsel declined the opportunity to amend, stating, "'No, we don't want to plead—we don't need to plead promissory estoppel in terms of a separate cause of action.'" (*Id*. at p. 846, fn. 3.) After the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal, the plaintiff appealed and requested "leave to amend its petition and complaint to allege counts for promissory estoppel" and other claims. (*Id.* at p. 860.) The plaintiff also requested permission to file a motion for relief in the trial court under Code of Civil Procedure section 473, subdivision (b). (*Las Lomas, supra*, at p. 847.) The appellate court refused to allow the plaintiff to seek relief from the trial court while the appeal was pending, stating that the grant of "such relief by the trial court would interfere with our exercise of jurisdiction on appeal." (*Id.* at p. 847, fn. 4.)

As to the plaintiff's request for leave to amend on appeal, the court in *Las Lomas* stated that although the general rule allows such requests to be made for the first time on appeal (Code Civ. Proc., § 472c, subd. (a)), the general rule does not apply "if the trial court sustains a demurrer with leave to amend and the plaintiff elects not to amend the pleading. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.) In those circumstances,

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5 In *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, for example, the Supreme Court applied the general rule allowing a plaintiff to request leave to amend for the first time on appeal. The court noted that although there was a prior opportunity to amend for the sole purpose of attempting to state a cause of action under Government Code section 815.6, the plaintiff was never given "a fair opportunity to amend its complaint to state a cause of action under any other legal theory. [Citations.]" (*Id.* at p. 971.) This case is distinguishable from *Aubry* because Saad was given a fair opportunity to allege her compliance with the claims statute and failed to do so.

‘“it must be presumed that the plaintiff has stated as strong a case as he can.”’ (*Ibid.*)” (*Las Lomas, supra,* 177 Cal.App.4th at p. 861.) Based on its determination that the plaintiff had elected not to amend the complaint, the court concluded that the plaintiff “forfeited its claim of error based on the denial of leave to amend.” (*Ibid.*)

The question we face is whether Saad’s failure to amend her complaint to allege the filing of a claim constituted an election not to amend. If we conclude that Saad elected not to amend, the general rule allowing a plaintiff to seek leave to amend for the first time on appeal would not apply. (*Reynolds v. Bement*, *supra,* 36 Cal.4th at p. 1091; *Las Lomas, supra,* 177 Cal.App.4th at p. 847.)

According to Saad’s declaration, which she included as an exhibit to her opening brief on appeal, she did not amend her complaint to allege the filing of a claim because she erroneously believed that such an amendment was not necessary.[6] Although we appreciate that Saad is not an attorney, we must consider the fact that she was specifically informed by the court of the necessity to amend her complaint to allege the filing of a claim. Whether Saad understood the trial court’s remarks or not, she was obligated to follow “the same restrictive rules and procedures as an attorney. [Citation.]” (*Kabbe v. Miller* (1990) 226 Cal.App.3d 93, 98.) Accordingly, her ignorance of the law is not an excuse.

We find no meaningful distinction between this case and *Las Lomas,* where the plaintiff’s attorney declined to amend the complaint based on a belief that the amendment was not necessary. (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 846, fn. 3 [“‘we don’t need

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6 Saad states in her declaration on appeal: “The Superior Court and its Judgment dismissing my Complaint stated that the demurrer was sustained because among other things I had not alleged the filing of a claim. Not being a lawyer, and knowing nothing about legal procedure[,] I did not know that I had to put into my amended complaint the fact that I had filed a claim. In truth and fact, I had filed a notice of claim but thought all I had to do was to present at the court hearing a copy of my claim. Unfortunately, I was unable to appear at the hearing on the demurrer to the first amended complaint because I was seriously ill on that date. I now know that I was mistaken in my belief and understanding.”

to plead promissory estoppel in terms of a separate cause of action'"].) We conclude that because Saad had an opportunity to amend her complaint to allege the filing of a claim but elected not to do so as a result of her mistaken belief that the amendment was unnecessary, the general rule allowing a plaintiff to request leave to amend for the first time on appeal does not apply. (See *Reynolds v. Bement*, *supra*, 36 Cal.4th at p. 1091; *Las Lomas*, *supra*, 177 Cal.App.4th at p. 847.) "Leave to amend further is properly denied when a plaintiff fails to amend to correct defects on the basis of which special demurrers to a previous complaint were sustained, or as directed by the court when sustaining such demurrers. [Citations.]" (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 327.)

Given that the demurrer was properly sustained without leave to amend based on Saad's failure to allege the filing of a claim, we need not decide whether the demurrer was properly sustained on other grounds.

DISPOSITION

The judgment (order sustaining demurrer without leave to amend) is affirmed. The City is awarded its costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.